78-1303

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BEATRICE M. CHISNELL,
Respondent,

-VS-

ROBERT LLOYD CHISNELL,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1978

BEATRICE M. CHISNELL,
Respondent,

-vs-

ROBERT LLOYD CHISNELL,
Petitioner.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectuflly prays that the Petition for Writ of Certiorari to review the final Order of the Supreme Court of the State of Michigan entered on November 29, 1978, denying leave to appeal from the decision of the Court of Appeals, State of Michigan, affirming the decision of the Circuit Court of the State of Michigan for the County of Macomb, be denied.

OPINION BELOW

The Order denying the Application for Leave to Appeal in the Michigan Supreme Court was entered on November 29, 1978, and is not reported; it is printed in Appendix A at Page 1a, infra. The Opinion of the Michigan Court of Appeals is recorded at 82 Michigan Appeals 699 and 267 NW2d, 479. This opinion is printed in Appendix A at Page 3a, infra. The Judgment of Divorce is printed in Appendix A at Page 11a, infra.

JURISDICTION

The Order denying the Application for Leave to Appeal of the Michigan Supreme Court was made and entered on November 29, 1978. Respondent concedes that petitioner's Petition was filed within ninety days of that date. However, respondent denies jurisdiction pursuant to Rule 19 of the Rules of the United States Supreme Court, Section 1(a), in that the Michigan State Court has not decided a federal question of substance not heretofore decided by this Court nor has the Michigan Court decided it in a way not in accord with the applicable decisions of this Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DOES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION PRECLUDE THE STATE OF MICHIGAN FROM JUDICIALLY CHARACTERIZING MILITARY RETIREMENT PAY AS A MATERIAL ASSET WHEN SUCH CHARACTERIZATION IS NOT CONTRARY TO ANY STATUTORY PROVISION AND DONE IN THE ABSENCE OF EXPRESSION OF CONGRESSIONAL INTENT AS TO SUCH CHARACTERIZATION?

II. ARE THE MICHIGAN COURTS PRECLUDED FROM CHARACTERIZING MILITARY RETIRED PAY AS COMPENSATION FOR PAST SERVICES OR IN THE ALTERNATIVE AS A MARITAL ASSET IN ORDER THAT SAID COURTS HAVE JURISDICTION TO ORDER AN EQUITABLE DIVISION OF SUCH PAY ACCORDING TO THE APPLICABLE MARITAL PROPERTY LAWS WHEN FEDERAL COURTS HAVE NOT CLEARLY CHARACTERIZED SUCH PAY?

STATEMENT OF THE CASE

Respondent acknowledges petitioner's Statement of the Case as true and correct.

ARGUMENT

I. THE DECISION OF THE MICHIGAN TRIAL COURT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT IN THAT IT DOES NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, OR THE PRE-EMPTIVE AUTHORITY OF THE UNITED STATES CONGRESS IN THE AREA OF FEDERAL MILITARY BENEFITS.

Respondent contends that a state court may order her an interest in her husband's vested military retired pay and that such an order does not violate the dictates of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and the power of Congress to raise and support armies, Article I, Section 8.

Clearly, our founding fathers intended Congress to have the power to raise and support armies for our national defense. However, it does not follow from the acknowledgement of this proposition that a state court award to a wife, of an interest in her husband's vested military retired pay, infringes upon that congressional power. The state court has not ordered any federal agency to take any action, but has ordered an individual to make certain payments.

Appellee concedes that Congress enacted the military retirement scheme to provide an additional inducement to citizens of the United States to make a career of the armed services and, therefore, endeavor to offer "the most liberal retirement provisions. . . in the world." 104 Cong. Rec. 7613; remarks of Senator Stenus of Mississippi. However, it

cannot, therefore, be deduced that Congress sought to immunize said retirement pay from state court divorce proceedings. Certainly, Congress could not have been so callous so as to provide an inducement, to a historically all male military, which provided in effect: Join the Army, serve 20 years, retire and feel assured that should you divorce, your spouse will have no interest in your retired pay. It does not follow that awarding a wife an interest in her husband's retired pay "creates a disincentive to establish a career in the military, or detract from a serviceman's spirit or future security." *Ramsey* v *Ramsey*, 92 Idaho 672; 535 P2d 53 (1975).

On January 4, 1975, the President signed into law the Social Services Amendments of 1974, P. L. 93-647, Part B, Section 101(a) of the new law amends the Social Security Act by adding a new Section 659 which waives sovereign immunity of the United States from such and for the first time permits garnishment or attachment against the United States for the enforcement of alimony or child support obligations of members of the armed services. Specifically, PL 93-659; 42 USCS 659 provides:

> Notwithstanding any other provisions of law, effective January 1, 1975, moneys due from or payable by, the United States, to any individual, including members of the armed services, shall be subject; in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against any such individual of his legal obligations to provide child support or make alimony payments.

Congress, in waiving its sovereign immunity and consenting to collection procedures in the above mentioned instances, impliedly acknowledges that an award of an interest in retirement pay does not contravene the power of Congress to raise and support armies or defeat the purpose of the military retired pay scheme to provide additional inducement to make a career of the military.

Significantly, Congress found it necessary to regulate only with respect to its immunity from collection remedies. Congress found it unnecessary to enact legislation expressly making military pay available for a state court to consider when that court was faced with questions of alimony or child support. Assuredly, Congress would have made such an express provision if it had considered that such state court action would have interferred with a federally created right that was immune from state court action. Indeed, state courts have always had the power to order military personnel, whether retired or in active duty to make child support or alimony payments without infringing upon the exclusive province of Congress. The very wording of the enactment of 93-647, 42 USC 659 is determinative of the states' power. "The [United States is subject to legal process for] the enforcement, against any [military personnel's] *legal obligations* to provide child support or make alimony payments." Congress, then, has expressly provided that a state court, in taking into consideration, military retired pay, when making an award of alimony or child support has done so legally and properly and that the order of the court imposes upon the individual a legal obligation. Nowhere, does Congress in enacting PL93-645; 42 USCA 659 indicate that the orders of state court prior to January 1, 1975, were illegal in that they were in violation of a federally created right designed to induce citizens of the United States to make a career of the military. Can it now be said, that a state court characterization of military retired pay as a marital asset, infringes upon the power of Congress to support our armies or contravene express Federal legislation. Respondent respectfully submits that "on rare occasions when state family law has come into conflict with a Federal Statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that the state law be pre-empted." *Wetmore* v. *Markoe*, 196 US 168; 49 LEd 390; 25 S Ct 172 (1904). Clearly, Congress in enacting the military retired pay scheme, has not positively required by direct enactment that such retired pay cannot be characterized by

state courts as a marital asset. Furthermore, a mere conflict in words is not sufficient. State family and family property law must do major damage to clear and substantial Federal interests before the Supremacy Clause will demand that state law be overridden. *United States* v. *Yazell*, 382 US 341, 352; 15 LEd2d 404; 86 S Ct 500 (1966). Given the ability of states to reach military wages or retirement pay to satisfy child support or alimony obligations, clearly, it cannot be said that a state court's characterization of military retired pay as a marital asset does "major damage" to any "clear and substantial government interest."

Failure by the petitioner to designate the respondent as a beneficiary under the "Survivor Benefit Plan" 10 USC 1431 *et. seq.*, is irrelevant as an indication that Congress had explicitly characterized petitioner's retired pay as his sole and separate property immune from state court jurisdiction. *Wissner* v. *Wissner*, 338 US 665; 70 S CT 398; 94 LEd 424 (1950), is readily distinguishable from the case at bar. In *Wissner*, this Court found that a state court award of a community property interest in a serviceman's national life insurance policy to his widow where the serviceman had designated his mother as sole beneficiary "frustrates the deliberate purpose of Congress" and therefore, could not survive constitutional muster. The Idaho Supreme Court, in *Ramsey* v. *Ramsey*, *supra*, wherein a spouse was granted a community property interest in her husband's military retired pay, indicated that the keystone to the *Wissner* decision was the "statute which made the insurance proceeds possible was explicit in announcing that the insured shall have the right to designate the recipient of the insurance, and that no person shall have a vested right to those proceeds." 38 UCC-802(i); 38 USCS 802(i). The *Ramsey* court concluded that there is no comparable conflict between the statutes creating servicemens' retirement pay rights and the application of state community property law. In *Wissner* the serviceman actually made a designation of who was to receive the insurance benefits. The court protected that right to designate and upheld the insured's

actual designation. In the case at bar, petitioner elected not to provide an annuity for his wife. This election is unremarkable given the fact respondent was older than the petitioner and that the annuity would cease upon a widower's death. See 10 USCS 1434. Indeed, a serviceman making such an election is required to fund the annuity. See 10 USCS 1436 and also 10 USCS 1438. The funding requirement would reduce the solider's rate of pay. Furthermore, petitioner argues, in essence, that Congress, in providing the Family Protection Plan, has characterized a military pension as the soldier's sole and separate property. The total flow in the argument is that petitioner fails to recognize what Congress sought to achieve by enactment of the Family Protection Plan. The Plan was enacted to provide benefits to the family of a deceased, retired serviceman. Congress recognized that benefits payable to a retired serviceman would terminate upon his death. Upon death, no benefits would be available to the family. The Family Protection Plan would enable the retiree, through his contribution to the Plan, insure that his family would be provided for upon his demise. The Family Protection Plan then is essentially a form of life insurance. A means whereby the retiree could extend his retired pay beyond his life. Further still, petitioner's argument that deductions from the retiree's pay to fund the annuity he elected, would cease upon death or divorce of the spouse of the insured, is also unremarkable. By state statute, any interest that a wife had in the policies of insurance of her divorced husband, by operation of law, terminated upon entry of the Judgment of Divorce. The Federal scheme merely parrots that principle. Respondent respectfully submits that petitioner's ability to provide or refuse to provide a Family Protection Plan for his spouse is immaterial to the question of whether or not Congress intended retired pay to be the recipient's sole and separate property. The case at bar then is readily distinguishable from *Free* v. *Bland*, 369 US 653; 82 S Ct 1089; 8 LEd2d 180 (1962) and *In Re: Marriage of Nizenkoff*, 65 Cal App 34e; 135 Cal Rptr 189 (1977) and *Wissner* v. *Wissner*, *infra*, in that in each of those cases, the Court

protected a clearly defined and expressly stated statutory right. Here, petitioner argues that failure to exercise an express right precludes a state court from characterizing military retired pay as a marital asset. The argument improperly extends the decision of this Court.

Respondent respectfully submits that this Court's decision in *Hisquierdo* v. *Hisquierdo*, US ; 59 LEd2d 1; 99 S Ct , which reversed the decision of the California Supreme Court granting Mrs. Hisquierdo an interest in her husband's railroad retirement benefits is readily distinguished from the case at bar and should not be considered as determinative of the case at bar.

Hisquierdo formulated the applicable test to be applied when the Supremacy Clause is advanced as authority to limit a state court's jurisdiction in family law related areas.

> The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal programs to require nonrecognition. 59 LEd2d at p.12.

The Court, in reversing the California Supreme Court, noted that the Railroad Retirement Act (45 USCS 231 *et. seq.)* expressed in clear statutory language that the retired employee was to be the sole beneficiary of retirement benefits. The Court decision rested heavily upon the attachment anti-anticipation provision contained in Section (231m) of the Act. The Court reasoned, "Here, California must defer to the Federal Statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of Federal law require. The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation."

In the case at bar, the military retired pay scheme, contains no such flat prohibition against attachment or anti-anticipation. Furthermore, respondent submits that nothing in the military retired pay scheme indicates that the

benefits received thereunder are the recipient's sole and separate property. Indeed, the Act is silent with respect to the subject. Therefore, one should logically conclude that Congress intended the divorced spouse to look to state family law as her remedy. As the Court has indicated, in footnote 24, ". . . Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses . . ."

The case at bar is further distinguishable from *Hisquierdo, supra*. Here, petitioner has retired and is currently receiving benefits. Those benefits cease, as does the respondent's ability to receive payment pursuant to the lower court's order, upon the death of the petitioner. There is no danger that respondent will receive benefits greater than those received by the petitioner.

Respondent respectfully submits that there is nothing in the Military Pension Act "to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in [Michigan] are a normal incident of marriage." *Hisquierdo* v. *Hisquierdo, supra,* dissenting opinion of Mr. Justice Stewart.

In *In Re: Marriage of Fithian,* 11 Cal Rptr 396; 517 P2d 449 (1974 Cal S Ct), *Cert. Denied,* 419 US 825; 95 S Ct 41; 42 LEd2d 48, (1974), the appellant husband was married to his wife for sixteen of his twenty-two years of military service. The Court granted to wife a proportionate share in her husband's retired pay. The Court rejected the husband's claim that the award frustrated the purpose of Congress in enacting the military retired pay system and was, therefore, beyond the jurisdiction of the state court. The *Fithian* court recognized that Congress did not characterize military retired pay as the serviceman's personal entitlement so as to make that right immune from state court divorce proceedings. See 42 USC 659; 42 USCS 659. "Congress used the phrase 'personal entitlement' to signify that retirement benefits cease with the death of the serviceman, and provide no continuing means of support for the serviceman's widow

or family." Indeed, footnote 8 of the decision indicates that the phrase "personal entitlement" occurs in the context of underscoring the need for an annuity plan to provide for the deceased serviceman's family. Petitioner intimates that the California Supreme Court in *In Re: Marriage of Nizenkoff*, 65 Cal App 34e; 135 Cal Rptr 189 (1977) decided subsequent to *In Re: Marriage of Fithian, supra*, which held that Social Security benefits are not subject to division in a divorce proceeding thereby precludes a state court from awarding a spouse an interest in his/her spouse's vested military retired pay. However, respondent respectfully submits that the *Nizenkoff* court, at page 192, expressly stated:

> We note that in *Fithian, supra*, our Supreme Court (10 Cal 3rd at pp. 597-600, 111 Cal Rptr 369, 517 P2d 449), *was unable to find any express intent of Congress to provide for the divorced spouse and reasoned that since military retirement benefits did not survive the serviceman, Congress intended to provide only for surviving spouses and leave surviving ex-spouses to state family law concepts of support. The contrary is true here. A ruling that the Social Security benefits are divisible community assets would seriously interfere with the express statutory scheme of the Social Security Act and is forbidden by the Supremacy Clause of the United States Constitution* (Act VI, Clause 2).

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS IN THAT THE DECISION BELOW DETERMINED THAT FEDERAL MILITARY RETIRED PAY IS A MARITAL ASSET AND NOT WAGES OR IN THE ALTERNATIVE THE SEPARATE ENTITLEMENT OF PETITIONER.

Respondent respectfully submits that a state court's characterization of military retired pay as a marital asset does not conflict with the decisions of Federal Courts.

Respondent's position is that petitioner's military retirement pay is a marital asset properly subject to division in a divorce proceeding under MCLA 552.1 *et. seq.*; MSA 25.81 *et. seq.* In *Hutchins* v. *Hutchins*, 71 Mich App 361; 248 NW2d 272 (1976), the Michigan Court of Appeals held that a contributory pension plan was a marital asset subject to division in divorce proceedings. The court reasoned as follows:

> Here, the Plaintiff-Husband's interest was created in most part from his salary, and we agree with the defendant-wife that these deductions would have been available to the parties during their marriage to be invested in stocks, bonds, savings accounts, annuity and/or other investments.

The logical extent of this rationale clearly encompasses the case at bar. Although, a military pension is non-contributory in the sense that a member of the armed services need not invest any percentage of his active duty pay, the pay scale itself together with the realities of military life provide a built-in contributory system. The Supreme Court of California recognized that although essentially non-contributory, the military retirement pay system constitutes an integral part of an officer's compensation for service in the military. *In Re: Marriage of Fithian*, 11 Cal Rptr 396; 517 P2d 449 (1974 Cal S Ct), *Cert. Denied*, 419 US 825; 95 S Ct 41; 42 LEd2d 48, (1974). Viewed as such an integral part of the Army pay structure, certainly one can argue that had not the military pay system been so structured, assets would have been available to the marriage for investment in stocks, bonds, savings accounts or annuities. The uncontemplated event of divorce should not deprive the wife of her right to share in an asset earned during the marriage, but enjoyment of which is delayed until retirement.

The threshold issue is whether military retirement pay was intended as deferred compensation for a person's service prior to retirement, or payment for the limited status

of the person after retirement. The California Supreme Court in *In Re: Marriage of Fithian, supra,* held:

> Military retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to compensate him for his limited responsibility to the government after his retirement. Indeed, the amount of retirement pay a serviceman received bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. (10 USC § 6323(e).) Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter, (10 USC § 1402.) The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property to the extent the serviceman was married while on active duty. 517 P2d at 456-457.

The *Fithian* court did not feel that this result was affected by the fact that the officer had not contributed, either directly or in the form of payroll deductions, to the fund out of which the retirement pay is disbursed. The court found the question of contribution irrelevant to the ultimate characterization of the benefits.

> Although the retirement fund was non-contributory, husband's rights to the benefits vested during marriage and constituted an integral part of his compensation for service in the military. 517 P2d at 451.

At trial, respondent maintained that appellant's right to receive retired pay was a vested asset. It was established

that appellant had been receiving said pay without interruption since 1972. (T6.) The right to retirement pay can be said to have vested after twenty (20) years, but he cannot start to draw it until he does retire and is still alive, and therefore, the right is subject to divestment or prior death or discharge. *In Re: Marriage of Ellis,* 538 P2d 1347, (Colo App 1975), affirmed 552 P2d 506, (Colo S Ct, 1976).

Assuming arguendo that this Court finds that petitioner's military retired pay is not a vested asset, respondent submits that said finding should not effect the result achieved in the trial court. As the Michigan Court of Appeals noted in *Hutchins* v. *Hutchins, supra,* the divorce laws of Michigan make no reference to the requirement of vesting. See MCLA 552.1 *et. seq.*; MSA 25.81 *et. seq.* Here, as in *Hutchins,* appellant's right to receive his retirement pay is firmly established and cannot be forfeited except for various enumerated breaches of the military code. See 5 USC 5532; 5 USC 8312; 37 USC 801. Given the built-in contributory nature of retired military pay, "it is property that came to the appellant by reason of the marriage and therefore should be included in the total assets of the parties." *Hutchins* v. *Hutchins, supra.*

Respondent acknowledges that "the amount of retired pay is wholly within the control of Congress, that a retired soldier could expect increases or reductions which might be legislated from time to time and therefore retirement pay (is) not a fixed asset having a cash surrender, loan, redemption or lump sum value." *In Re: Marriage of Ellis, supra.* Notwithstanding these incidents of the system of retired pay, petitioner's current receipt and right to receive retired pay, be it only day to day, "is not in the nature of future earnings but is an asset acquired during coverture and is not a gift or gratuity accruing to the husband." *Loomis* v. *Loomis,* 47 Wash 2d 468; 288 P2d 235 (1955). Other community property states regard military retirement plans and other retirement pay as a mode of employee compensation. It is an earned property right which accrues by reason of a specified number of years of service in a

particular branch of the armed services. *Mora* v. *Mora*, 429 SW2d 660, (Tex Civ App 1968); *LeClert* v. *LeClert*, 80 NM 235; 453 P2d 755 (1969). The Supreme Court of Washington in *Roach* v. *Roach*, 72 Wash 2d 144; 432 P2d 579 (1967) viewing the substance rather than the form of military retired pay, held it properly the subject of a property division in a divorce proceeding. The court noted that though a military pension is "not an asset but an emolument or economic advantage of office, (it does) not preclude the court from treating certain aspects of that pension as property, regardless of the fact that there are inherent limitations that make it different from fixed assets."

In *Ramsey* v. *Ramsey*, *supra*, the court surveyed the decisions of other community property states and set forth the generally recognized position of those states:

> . . . military retirement benefits, to the extent that such benefits have vested or accrued to the husband and wife while domiciling in a community property state are community property subject to a division between the parties upon dissolution of the marriage. *In Re: Marriage of Wilson (Wilson* v. *Wilson)*, 10 Cal 3rd 851, 112 Cal Rptr 405, 519 P2d 165, (1974); *Smith* v. *Lewis*, 107 Cal Rptr 94 (Cal App 1973); *Payne* v. *Payne*, 82 Wash 2d 573, 512 P2d 736 (1973); *Morris* v. *Morris*, 69 Wash 2d 506, 419 P2d 129 (1966); *Otto* v. *Otto*, 80 NM 331; 455 P2d 642 (1969); *LeClert* v. *LeClert*, *supra; Busby* v. *Busby*, 457 SW2d 551 (Tex 1970); *Dominey* v. *Dominey*, 481 SW2d 473 (Tex Civ App 1972); *Mora* v. *Mora*, 429 SW2d 660 (Tex Civ App 1968).

Although Michigan is not a community property state, respondent suggests that these courts have correctly diagnosed the essence of the military retirement pay shceme as a marital asset properly subject to a property division. Again in *In Re: Marriage of Fithian*, *supra*, the Supreme Court of California, in holding retired military pay properly subject to division in a divorce proceedings, recognized that

although factually military retirement pay was non-contributory, realistically, the retirement benefit constituted an integral part of compensation for service in the military. The reality of the retired pay system then fits squarely with the rationale of *Hutchins* v. *Hutchins*, *supra*. Had not appellant's military retirement pay been so integrally related to the military pay scheme, there would have been more assets available to the marriage for other investments.

New Jersey, a non-community property state, has recently granted a wife an interest in her husband's military pension. In *Krueger* v. *Krueger*, 139 NJ 413; 354 Atlantic 2d 340 (1976), the appellant-husband was at the time of trial receiving retired military pay. The court ordered him to pay "213/343rds of the total benefits, corresponding to the number of months when defendant was both married and in military service compared with the total number of months he was in the military." The court relied heavily on the decision in *Mora* v. *Mora*, *supra*, that retirement and pension plans represent "a mode of employee compensation which is an earned property right." In *Krueger* v. *Krueger*, *supra*, the appellate court quoted with approval the rationale of the trial judge:

> The retirement and disability benefits now vested in defendant constitute assets acquired by him during the marriage and for, the present purposes, are of the same nature as other assets acquired with the earnings derived from his employment. Accordingly these benefits constitute an asset subject to distribution, to the extent earned during the marriage.

The *Krueger* court further noted that "*Pension payments are no longer considered* a gratuity for faithful service, they are to some extent a recompence for past service . . . Logically, therefore, it can be argued that the right to such payments should be treated as property acquired during the marriage . . ." Finally, in *Watson* v. *Watson*, 424 F Supp 866 (1976), the United States District Court for the Eastern

District of North Carolina, held that retired military pay is wages for the purpose of coming within the provisions of 42 USC 659; 42 USCS 659. However, the Court at page 869 stated "While *the court hesitates to classify military retirement pay as wages for all purposes, the analogy is both necessary and useful in the present case.*"

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, respondent, BEATRICE M. CHISNELL, respectfully requests that petitioner's Petition for a Writ of Certiorari to review the decision of the Michigan State Supreme Court denying leave to appeal the decision of the Michigan Court of Appeals which affirmed the decision of the Macomb County Circuit Court for the State of Michigan, be denied.

Respectfully Submitted,
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Order of Michigan Supreme Court

APPENDIX A—

Order of Michigan Supreme Court Denying Application for Leave to Appeal—November 29, 1978.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of November in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice,

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 23-181 & a
COA: 72-2096
LC: 77-8220-DO

BEATRICE M. CHISNELL,
Plaintiff-Appellee,

v 61400

ROBERT LLOYD CHISNELL,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Order of Michigan Supreme Court

The motion for a performance bond and attorney fees is DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of November in the year of our Lord one thousand nine hundred and seventy-eight.

(s) Corbin R. Davis, *Deputy Clerk*.

Opinion of Michigan Court of Appeals

APPENDIX B—

Opinion of Michigan Court of Appeals—April 18, 1978

STATE OF MICHIGAN
COURT OF APPEALS

BEATRICE M. CHISNELL,
Plaintiff-Appellee,

v

ROBERT LLOYD CHISNELL,
Defendant-Appellant.

Docket
No. 77-2096

Before: J. H. Gillis, P.J., Bashara and D.C. Riley, JJ.

DOROTHY COMSTOCK RILEY, J.

This case involves an issue of first impression in Michigan; *i.e.*, the treatment of military retirement pay in a divorce proceeding. The issue focuses on the question of whether the trial court erred in awarding plaintiff a one-half interest in defendant's net retirement benefits as part of a property settlement where no provision was made for alimony.

Defendant entered the United States Army in 1949 but he left the military in 1953. He re-enlisted in 1955, just prior to his marriage to plaintiff, and retired in 1972 as Chief Warrant Officer, fourth class.

No children were born of this marriage. The parties owned two lots and accumulated personal property, including several cars, a boat, a camper and a car trailer, some of which were encumbered by loans. In 1975, the plaintiff filed her complaint for divorce.

Following a bench trial, the court awarded plaintiff a divorce providing that neither party receive alimony and that

all of the marital property be sold, with the proceeds going first to settle the liens on the property and the remainder to be divided equally between the parties.

The court found that defendant, by virtue of his years of military service, was receiving military retirement pay of $9,600 per year. After deducting 20 per cent of this amount for taxes, the court awarded plaintiff, as part of the property settlement, one-half of the net amount, or $320 per month. The payments were ordered to continue until the death of either party.

Defendant contends on appeal that military retirement pay is not a marital asset subject to division in a divorce action property settlement. He argues that the retirement pay is analogous to wages, which can only be considered as a factor in granting alimony. Since no alimony was awarded here, defendant argues, plaintiff has no interest in the net retirement pay.

Although no Michigan case has precisely decided this issue, the parties have referred us to several cases from other jurisdictions where the question has been reached with conflicting results. Our analysis of these decisions leads us to the conclusion that, although the question is subject to considerable debate with defensible arguments on both sides of the issue, the trial court below correctly held that the retirement pay was an asset of the marriage subject to a property division.

It appears to be the uniform holding of the community property states that military retirement pay is community property, subject to division upon divorce.[1] The most comprehensive such opinion is that of the California Supreme Court in *In re Marriage of Fithian*, 10 Cal 3d 592; 111 Cal Rptr 369; 517 P2d 449 (1974).

[1] *Dominey* v *Dominey*, 481 SW2d 473 (Tex Civ App 1972), *Busby* v *Busby*, 457 SW2d 551 (Tex 1970), *LeClert* v *LeClert*, 80 NM 235; 453 P2d 755 (1969), *Wilder* v *Wilder*, 85 Wash 2d 364; 534 P2d 1355 (1975), *Ramsey* v *Ramsey*, 96 Idaho 672; 535 P2d 53 (1975).

The *Fithian* court stated that under their community property law, retirement benefits which are earned by one spouse as an element of compensation earned for work done during the course of the marriage are divisable upon dissolution of the marriage. Thus, the threshold issue was whether military retirement pay was intended as deferred compensation for the person's service prior to retirement, or payment for the limited status of the person after retirement.[2] The *Fithian* Court held:

> "[M]ilitary retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. Indeed, the amount of retirement pay a serviceman receives bears no relation to any continuing duties after retirement, but is calculated solely on the basis of the number of years served on active duty and the rank attained prior to retirement. (10 U.S.C. § 6323(e).) Moreover, should the serviceman actually be recalled to active duty, he is not only additionally compensated according to the active duty pay scale, but his rate of retirement pay is also increased thereafter. (10 U.S.C. § 1402.) The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property to the extent the serviceman was married while on active duty." 517 P2d at 456-457.

The Court in *Fithian*, did not feel that this result was affected by the fact that the officer had not contributed,

[2] On retired status, the officer is subject to recall to active status, can be court-martialed for certain conduct and thereby lose the retirement pay, and is subject to various other provisions of Federal law. *See Ables* v *Ables*, 540 SW2d 769 (Tex Civ App 1976). *See also*, *Watson* v *Watson*, 424 F Supp 866 (E.D.N.C. 1976).

either directly or in the form of a payroll deduction, to the fund out of which the retirement pay is disbursed. The Court found the question of contribution irrelevant to the ultimate characterization of the benefits.

> "Although the retirement fund was noncontributory, husband's rights to the benefits vested during marriage and constituted an integral part of his compensation for service in the military." 517 P2d at 451.

Community property states are not the only jurisdictions to rule that military retirement pay is an asset of the marriage, divisable upon divorce. In *Kruger* v *Kruger*, 139 NJ Super 413; 354 A2d 340 (1976), the Superior Court of New Jersey, Appellate Division, held that the trial court had correctly distributed a share of the husband's retirement pay to the wife as a portion of the property division. No alimony was awarded.

The *Kruger* Court first considered the practical and financial aspects of terming such pay as an asset of the marriage rather than income to the husband.[3] The Court then cited from a number of community property cases, including *Fithian, supra*, which held the pay to be marital asset. The *Kruger* Court held:

> "We therefore conclude that both the retired pay and disability benefits which defendant husband has become irrevocably entitled to receive for the balance of his life constitute assets subject to equitable distribution to the extent that his entitlement thereto is based upon military service rendered during the existence of the marriage." 354 A2d at 344.

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[3] These considerations include the tax treatment of property divided upon divorce as opposed to alimony and the wife's right to receive payments after remarriage. In addition, if the pay was treated as income, the entire amount would be available for computation of alimony. If treated as an asset, the wife would have an interest only in that amount of pay that was earned during the years of marriage.

We recognize that the result reached by the Courts in *Fithian, supra*, and *Kruger, supra*, is by no means universal. Several jurisdictions have held military retirement pay to be an equivalent to wages, thereby constituting income to the retired spouse that is unavailable for distribution in a property settlement. In *United States* v *Williams*, 370 A2d 1134 (My Ct of App, 1977), the Maryland Court of Appeals, after having the question certified to them by the United States District Court, held that for the purposes of Maryland divorce law military retirement pay constitutes wages subject to garnishment for payment of an arrearage in alimony. A similar result was reached in *Watson* v *Watson*, 424 F Supp 866 (E.D.N.C., 1976), although the state's garnishment law altered the disposition of the case.

In *In re Marriage of Ellis*, 538 P2d 1347 (Colo App, 1975), *affirmed* 552 P2d 506 (Colo S Ct, 1976), the Colorado Court held that military retirement pay is not marital property since "[a]t no time has it any cash surrender, loan, redemption, or lump sum value." 538 P2d at 1349.

Although, as we have stated, no Michigan case has ruled specifically on this issue, the contrasting points of view in the previously cited cases were discussed by this Court in *Hutchins* v *Hutchins*, 71 Mich App 361; 248 NW2d 272 (1976). *In Hutchins*, the issue was the treatment of the husband's pension from the Michigan State Police. The Court noted that the pension question was one of first impression, so it turned to a consideration of analogous areas of law and to decisions of other states:

> "In our research in community and noncommunity property states, we find the courts holding that state pensions, private pensions, profit-sharing trust and *military pensions could be properly distributed as property* under a decree of divorce." (Emphasis added.) 71 Mich App at 365.

After discussing several of the cases concerning military retirement pay, and cases dealing with other forms of pensions, the *Hutchins* Court concluded:

> "Returning to the Michigan public safety department pension, accident and disability fund leads us, as do other jurisdictions with similar statutes, to the conclusion that it also treats the accumulated deductions in the husband's account in a manner which makes them marital property. Here, the plaintiff-husband's interest was created in most part from his salary, and we agree with the defendant-wife that these deductions would have been available to the parties during their marriage to be invested in stocks, bonds, savings account, annuity and/or other investments. The plaintiff-husband's right in the fund is fully vested and cannot be subjected to divestment or forfeiture, except as herein noted for breach of the public trust. We also hold that it is property that came to the plaintiff by reason of the marriage and therefore should be included in the total assets of the parties. As in New Jersey, our divorce laws make no reference to vesting. See MCLA 552.1 *et seq.*; MSA 25.81 *et seq*. Therefore, it must be included as an asset in the distribution of property." 71 Mich App at 370-371.

In the present case, we are persuaded by the decisions in *Fithian, supra, Kruger, supra,* and by analogy in *Hutchins, supra,* that defendant's military retirement pay was correctly categorized as a marital asset and included within the property settlement. As the *Hutchins* Court states, vesting is not a relevant consideration in our divorce laws. We find, as did the Court in *Fithian,* that military retirement pay is primarily deferred compensation for services rendered prior to retirement. This being the case, the fact that defendant did not have to contribute to a retirement pay fund does not distinguish this type of pension from that in *Hutchins*. Congress could have eliminated the retirement pay system and increased the rate of pay during active service. Since the

decision was made to provide for retirement benefits, the deferred compensation was not available to the parties during defendant's active service for use in other investments. Therefore, plaintiff, through her contribution to the marriage, obtained an interest in the marital asset of the earned retirement pay.[4] *Hutchins, supra.*

Defendant also contends that a decision by this Court that the retirement pay is a marital asset will conflict with the supremacy clause of the United States constitution[5] by interferring with Congress' exclusive power to raise and support armies. We note that this contention was answered contrary to defendant's assertions in *In re Marriage of Fithian, supra,* at 451-453. We concur in that reasoning and find no violation of the supremacy clause.

Defendant asserts that the division of property was inequitable and that the court should not have considered fault when making the property division. Fault is still a consideration in matters of property division, notwithstanding Michigan's no-fault divorce laws. *Kretzschmar* v *Kretzschmar,* 48 Mich App 279; 210 NW2d 352 (1973). Our reading of the record shows that the court considered fault in calculating the property division. Absent a showing of abuse of discretion, which has not been made here, we will not disturb the court's decision. See *Dougherty* v *Dougherty,* 48 Mich App 154; 210 NW2d 151 (1973); *Johnson* v *Johnson,* 346 Mich 418; 78 NW2d 216 (1956).

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[4] We note that, consistent with the decision in *In re Marriage of Fithian,* 10 Cal 3d 592; 111 Cal Rptr 369; 517 P2d 449 (1974), the trial court expressly stated that plaintiff's interest in the retirement pay will cease upon either the death of defendant or her death, whichever occurs first.

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[5] US Const, art 6, § 2.

Defendant finally challenges the trial court's award of $650 in attorney fees to plaintiff. Again, the granting of attorney fees in a divorce action is a matter of discretion. *Gove* v *Gove*, 71 Mich App 431; 248 NW2d 573 (1976). We find no abuse of that discretion in the present case.

Affirmed.

Costs to appellee.

APPENDIX C—

Judgment of Divorce of the Circuit Court for the County of Macomb — April 21, 1977.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

IN THE CIRCUIT COURT FOR
THE COUNTY OF MACOMB

BEATRICE M. CHISNELL,
Plaintiff,

-vs- No. 75-8220-DO

ROBERT LLOYD CHISNELL,
Defendant.

THOMAS J. MC CALLUM (P17274)
Attorney for Plaintiff

JUDGMENT OF DIVORCE

At a session of said Court, held in the County Building, City of Mt. Clemens, State of Michigan, on April 21, 1977

PRESENT: HONORABLE HUNTER D. STAIR
Circuit Judge

This cause having come on for trial upon the Complaint of the plaintiff and the answer of the defendant and the parties having appeared in person and by counsel, and the Court having heard the testimony and evidence submitted and the arguments of counsel, and being fully advised in the

premises, this Court finds that the plaintiff has sustained the allegations contained in her Complaint and is entitled to a Decree of Divorce from the defendant.

NOW, THEREFORE, on Motion of Thomas J. McCallum, attorney for plaintiff,

ABSOLUTE DIVORCE

IT IS HEREBY ORDERED AND ADJUDGED that the marriage between BEATRICE M. CHISNELL, plaintiff and ROBERT LLOYD CHISNELL, defendant, be and the same is hereby dissolved and a divorce from the bonds of matrimony between said parties be and the same is hereby adjudged.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that neither of the parties hereto be awarded permanent alimony and none is ordered.

PROPERTY SETTLEMENT

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to the plaintiff, BEATRICE M. CHISNELL, from the proceeds of his monthly vested pension with the United States Government as a result of his service with the Military Service of the United States, the sum of Three Hundred Twenty and 00/100 ($320.00) Dollars per month during the life of said pension, so long as the plaintiff shall live.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1973 21-foot Bayliner boat with inboard-outboard motor and trailer be sold and the proceeds thereon divided equally between the parties hereto provided, however, that

any and all liens securing both boat, motor and trailer, up to the sum of Three Thousand Six Hundred and 00/100 ($3,600.00) Dollars be paid equally by the parties hereto and that any additional liens against said boat, motor and trailer, be paid by the defendant-husband individually. All proceeds of said sale exceeding Three Thousand Six Hundred and 00/100 ($3,600.00) Dollars shall be divided equally between the parties hereto.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1971 Vagabond Trailer Coach and homemade trailer be sold and the proceeds divided equally between the parties hereto, provided however, that all liens on said trailer coach up to the sum of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars be divided equally and paid equally by the parties hereto and that any liens exceeding the sum of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars shall be paid by the defendant, ROBERT LLOYD CHISNELL, individually. The parties shall then divide equally all sums received in excess of Four Hundred Thirty-Six and 51/100 ($436.51) Dollars and divide same equally.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' 1972 Chevrolet Carryall Van be given to the defendant, ROBERT LLOYD CHISNELL, subject to any and all liens thereon and that said defendant shall hold the plaintiff, BEATRICE M. CHISNELL, harmless from any obligation thereon.

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall have as their sole personal property, all right, title and interest in any accounts which such said parties should have with the Joint Military Services Credit Union and each party hereto shall hold the other harmless from any obligations to the Joint Military Services Credit Union for indebtedness carried in such party's name.

IT IS FURTHER ORDERED AND ADJUDGED that the real properties that the parties own in Luce County,

Newberry, Michigan, and Antrim County, Michigan, be sold and the proceeds divided equally between the parties hereto.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall have as his own personal belongings, all of his hand tools.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, BEATRICE M. CHISNELL, shall have and receive all of the parties' household furniture and furnishings as her personal property.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall discharge any obligations owing to Sears Roebuck & Company or Master Charge.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, BEATRICE M. CHISNELL, shall have and receive the 1973 Dodge automobile and hold the defendant harmless from any obligations thereon and that the plaintiff-wife shall also have and receive the 1970 Volkswagon automobile and hold the defendant harmless from any obligations thereon.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff-wife shall have and receive any and all items contained in a certain safe-deposit box with the Mt. Clemens Bank, located at the North Branch Office of said bank, the same being safe-deposit Box No. 3-000406-8.

IT IS FURTHER ORDERED AND ADJUDGED that savings accounts in the name of either of the parties hereto, be divided equally between the parties hereto.

ATTORNEY FEES

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to

Thomas J. McCallum, attorney for the plaintiff, the sum of Five Hundred and 00/100 ($500.00) Dollars as an attorney fee in this cause forthwith.

INSURANCE POLICIES

IT IS FURTHER ORDERED AND ADJUDGED that any interest which either of the parties hereto may have had or now have in any of the insurance policies or contracts of the other party shall be, and is hereby extinguished. The parties hereto shall, in the future, hold all such insurance free and clear of any right or of any interest which the other may have had heretofore or may have therein or thereto by virtue of being the beneficiary, the contingent beneficiary or otherwise.

DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, ROBERT LLOYD CHISNELL, shall pay to the plaintiff, BEATRICE M. CHISNELL, the sum of One and 00/100 ($1.00) Dollar which shall be in lieu of and in full accord and satisfaction of any and all claims on the part of the plaintiff, or account of dower in the lands of her husband, which he now owns or may hereafter own or have any interest in, and that he shall hereafter hold his remaining property, both real and personal, free, clear and discharged of any dower or claim of dower on the part of the plaintiff.

EXECUTION OF DOCUMENTS

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall execute such documents as are required by them to be executed to effectuate the terms of the within Judgment and that if either of the parties hereto fail to execute and deliver said documents, the other party

may cause a certified copy of the within Judgment to be recorded with the Office of the Register of Deeds for the County of Macomb, State of Michigan, and the Michigan Secretary of State's Office and such recordation in and of itself shall act in lieu of the formal execution of said documents.

EFFECTIVE DATE OF JUDGMENT

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment shall be effective and final immediately upon entry hereof.

(s) Hunter D. Stair
CIRCUIT JUDGE

By (s) Marilyn Clime
DEPUTY CLERK

Approved as to form:

(s) Beatrice M. Chisnell,
Plaintiff

(s) Thomas J. McCallum
Attorney for Plaintiff

(s) Robert Lloyd Chisnell,
Defendant

(s) Gary E. Gendernalik
Attorney for Defendant